DATO' SERI ANWAR IBRAHIM

v.

PP

FEDERAL COURT, KUALA LUMPUR
MOHAMED DZAIDDIN CJ
STEVE SHIM CJ (SABAH & SARAWAK)
HAIDAR MOHD NOOR FCJ
[CRIMINAL APPEAL NO: 05-4-2000 (W)]
10 JULY 2002

CRIMINAL PROCEDURE: *Prosecution - Propriety of - Accused prosecuted under ordinance that is in process of being annulled - Whether oppressive and an abuse of process on part of A-G - Lower House passed resolution to annul ordinance - Upper House yet to pass resolution - Whether ordinance still in force - Whether has full force of law - Whether entirely within discretion of A-G to prosecute accused under such ordinance - Emergency (Essential Powers) Ordinance No 22 of 1970 - Federal Constitution, arts. 150(3), 145(3)*

CONSTITUTIONAL LAW: *Legislation - Annulment of - Lower House passed resolution to annul ordinance - Upper House yet to pass resolution - Whether ordinance still in force - Whether has full force of law - Whether entirely within discretion of A-G to prosecute accused under such ordinance - Emergency (Essential Powers) Ordinance No 22 of 1970 - Federal Constitution, arts. 150(3), 145(3)*

CRIMINAL PROCEDURE: *Charge - Amendment of - Amendment of charges at close of prosecution's case - Whether unfair of trial judge to have allowed - Whether prejudicial to accused - Whether amendments necessary to avoid duplicity - Whether there was substantial miscarriage of justice - Whether initial framing of charges bad*

CRIMINAL LAW: *Emergency (Essential Powers) Ordinance No 22 of 1970 - Section 2(1) - Corrupt practice by member of administration - Definition of - Section 2(2) - Use of public position or office for pecuniary or other advantage - Whether wrongful act done must be in relation to discharge of duties of officer - Whether 'capacity' means 'duty' - Meaning of 'pecuniary or other advantage' - Whether ejusdem generis rule applies - Whether 'other advantage' means advantage having monetary value - Or whether means 'other than pecuniary advantage'*

EVIDENCE: *Appeal - Interfering with findings of fact - Credibility of witnesses - Demeanour - Assessment and findings of trial judge - Whether unsupported by or against weight of evidence - Whether Federal Court should interfere when Court of Appeal has affirmed High Court's findings on credibility*

EVIDENCE: *Relevancy - Duty and powers of trial judge - Evidence Act 1950, s. 136(1) - Whether evidence sought to be admitted irrelevant - Whether refusal of trial judge to admit evidence unfair - Whether accused's defence impeded - Expunging of evidence by trial judge - Whether evidence more prejudicial than probative - Whether expunging of evidence more favourable to prosecution than to defence - Whether failure of justice occasioned*

CRIMINAL PROCEDURE: *Judge - Conduct of - Interruptions by trial judge - Whether excessive and unwarranted - Utterances of harsh words against counsel - Threats of contempt against counsel - Whether trial judge biased against defence and partial to prosecution - Whether conduct of trial judge occasioned miscarriage of justice*

WORDS & PHRASES: *"pecuniary or other advantage" - Emergency (Essential Powers) Ordinance No 22 of 1970, s. 2(2) - Whether 'other advantage' means advantage capable of having monetary value - Or whether means 'other than pecuniary advantage' - Whether ejusdem generis rule applies*

The appellant, a former deputy prime minister of Malaysia, was tried in the High Court on four charges of corrupt practice under s. 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 ('the Ordinance'), to wit, that he had, whilst being a member of the administration, unlawfully used his public position to his advantage by directing two senior police officers to obtain four written statements from one Azizan Abu Bakar and one Ummi Hafilda Ali denying their earlier accusations of sexual misconduct and sodomy against him, thereby saving himself from embarrassment and possible criminal proceedings. The trial judge convicted and sentenced him to six years of imprisonment for each of the four counts with the sentences running concurrently from the date of his conviction (*PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215 HC). The appellant's instant appeal to the Federal Court was from the judgment of the Court of Appeal (*Dato' Seri Anwar Ibrahim v. PP* [2000] 2 CLJ 695 CA) affirming the decision of the trial judge in respect of both conviction and sentence. The principal grounds of appeal were, *inter alia*: (i) that it was invidious, oppressive and an abuse of process to prosecute the

appellant under a law, *ie*, the Ordinance, which was halfway in the process of being annulled; (ii) that the amendments to the four original charges at the close of the prosecution's case was unfair and highly prejudicial to the appellant in that they had suddenly obviated the need for the prosecution to prove that the appellant did commit sexual misconduct and sodomy; (iii) that the trial judge's decision to expunge all evidence pertaining to the commission of sexual misconduct and sodomy was arbitrary and detrimental to the appellant because he would be prevented from showing that he did not commit those acts; (iv) that the prosecution had failed to prove the commission of any 'corrupt practice' by the appellant in his 'capacity' as a 'member of the administration' 'whereby he has used his public position or office for his pecuniary or other advantage'; (v) that the credibility of the prosecution's key witnesses was dubious; (vi) that the phrase 'pecuniary or other advantage' in s. 2(2) of the Ordinance can only mean a monetary advantage or an advantage having monetary value; (vii) the unfair invocation of s. 136(1) of the Evidence Act 1950 by the trial judge to exclude critical evidence sought to be adduced by the appellant as irrelevant and inadmissible; (viii) the excessive and unwarranted interference and intrusions by the trial judge in the course of the trial; (ix) that, based on the recent decision of the Federal Court in *Zainur Zakaria v. PP* [2001] 3 CLJ 673, the trial judge was indeed biased against the defence and/or partial to the prosecution as evidenced by his threatening and confrontational attitude towards the defence lawyers, particularly his conduct in 'prosecuting' the contempt proceedings he initiated against the defence counsel, Zainur Zakaria; and (x) that the sentence imposed was manifestly excessive *vis-à-vis* decided cases, and that it should have taken effect from the date of the appellant's remand.

Held:

Per Haidar Mohd Noor FCJ

[1] The Ordinance is annulled and ceases to have effect if and when both Houses of Parliament pass a resolution each to annul it pursuant to art. 150(3) of the Federal Constitution. Hence, although the Lower House had already passed a resolution to annul the Ordinance, it continued to be in force unless and until the Upper House has passed a similar resolution to annul it. The Ordinance thus continued to have the full force of law, and it was entirely within the discretion and preference of the A-G under art. 145(3) of the Federal Constitution to prosecute the appellant under the Ordinance. (pp 468 b-c, g-i, 469 a-f & 470 b)

[2] The trial judge was right in amending the four original charges on account of duplicity. Further, he had only done so after hearing counsel for both sides. Additionally, the opening address of the prosecution also revealed that it had never intended to prove the 'commission of sexual misconduct and sodomy' but merely 'corrupt practice'. There was therefore no substantial miscarriage of justice caused by the amendments although the initial framing of the charges by the prosecution was tenuous. (p 472 f-g)

[3] Although the trial judge did not allow the defence to address the court before he decided to expunge all evidence pertaining to the commission of sexual misconduct and sodomy, yet his decision did not occasion a failure of justice. This was because the prejudicial effect of such evidence (presumably on the defence) far outweighed its probative value. (pp 473 b-f & 474 b-c)

[4] The term 'corrupt practice' as used in s. 2(1) of the Ordinance and defined in s. 2(2) thereof does **not** require that the wrongful act done must be in relation to the discharge of the duties of the officer concerned. It merely refers to any act done by any member or officer in his capacity as such a member or officer whereby he has used his public position or office for his pecuniary or other advantage. The word 'capacity' in s. 2(2) of the Ordinance cannot therefore be taken to mean 'duty'. (p 475 d-i)

[5] There were no reasons to interfere with the trial judge's assessment and findings in respect of the credibility of the prosecution's key witnesses. Unless it could be shown that the factual findings of the trial judge in respect thereof were unsupported by or were against the weight of the evidence or that they were perverse, the Federal Court should be slow to disturb those findings particularly when the Court of Appeal had concurred with them. (p 478 a-d)

[6] The object of the Ordinance is wide so as to bring to book corrupt politicians and public officers who abuse their public positions or offices for their pecuniary or other advantage. The use of the words 'pecuniary or other advantage' is significant. The word 'other' appearing in the context of the definition is not caught by the *ejusdem generis* rule. Thus the words 'other advantage' in s. 2(2) of the Ordinance actually mean 'other than pecuniary advantage'. In this case, the advantage obtained by the appellant was that he had 'saved himself from embarrassment' and/or 'protected himself from any criminal action'. (pp 480 f-i & 482 h)

[7] The trial judge had a statutory duty to ensure that irrelevant and inadmissible evidence were excluded. His duty and powers under s. 136(1) of the Evidence Act 1950 were clear. (pp 485 f-h & 486 a-b)

[8] Although there were persistent interruptions by the trial judge, yet he did not 'descend into the arena and have his vision clouded by the dust of conflict'. (pp 486 h & 487 a)

[9] The conduct of the trial judge in the contempt proceedings against Zainur Zakaria was **not** really relevant to the four charges faced by the appellant. Although the trial judge might appear to have leaned towards the prosecution (as the Federal Court had found in *Zainur Zakaria v. PP* [2001] 3 CLJ 673), yet it could not be said that he had shown the same inclination – on the evidence – in the case against the appellant. That the trial judge had 'flexed every inch of his judicial muscle' or uttered harsh words against the defence lawyers or threatened them with contempt must be contrasted against the colourful backdrop of the trial and taken in that spirit. The overall conduct of the trial judge did not occasion a miscarriage of justice warranting appellate interference. (pp 487 d-h & 489 b-d)

Per Mohamed Dzaiddin CJ

[10] The sentence imposed by the trial judge, ie, six years' imprisonment for each of the four charges running concurrently from the date of conviction, was not manifestly excessive. The trial judge had exercised his discretion within the boundaries of s. 282(d) of the Criminal Procedure Code, and his reasons for not backdating the sentence to the date of the appellant's remand were valid. Save in exceptional circumstances, an appellate court does not normally alter the sentence imposed by the trial court. (pp 493 e-i, 494 a-b & d-g)

[Appeal dismissed; conviction and sentence affirmed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu, bekas timbalan perdana menteri Malaysia, telah dibicarakan di dalam Mahkamah Tinggi atas empat tuduhan amalan korup di bawah s. 2(1) Ordinan Darurat (Kuasa-Kuasa Perlu) No 22 Tahun 1970 ('Ordinan tersebut'), iaitu, bahawa beliau telah, sebagai seorang ahli pentadbiran, secara salah menggunakan kedudukan awam beliau bagi manfaatnya dengan mengarahkan dua orang pegawai polis kanan untuk mendapatkan empat kenyataan bertulis daripada seorang bernama Azizan Abu Bakar dan Ummi Hafilda Ali untuk menafikan pertuduhan mereka yang terdahulu mengenai salah laku seks dan liwat terhadap beliau, dan dengan itu menyelamatkan

dirinya daripada dimalukan dan kemungkinan prosiding jenayah. Hakim perbicaraan telah mensabitkan dan menjatuhan hukuman pemenjaraan selama enam tahun ke atas beliau di atas setiap satu pertuduhan dengan hukuman-hukuman tersebut berjalan secara bersama daripada tarikh pensabitan beliau (*PP v. Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215 HC). Rayuan perayu kini kepada Mahkamah Persekutuan adalah daripada penghakiman Mahkamah Rayuan (*Dato' Seri Anwar Ibrahim v. PP* [2000] 2 CLJ 695 CA) yang mengikrarkan keputusan hakim perbicaraan berhubung dengan kedua-dua sabitan dan hukuman tersebut. Alasan-alasan utama rayuan adalah, antara lainnya: (i) bahawa ianya adalah bersifat menyakitkan hati, menindas dan suatu penyalahgunaan proses untuk mendakwa perayu di bawah satu undang-undang, iaitu, Ordinan tersebut, yang mana sedang dalam usaha untuk dibatalkan; (ii) bahawa pindaan-pindaan kepada keempat-empat pertuduhan asal pada penutupan kes pendahwaan adalah tidak adil dan amat memudaratkan perayu iaitu mereka telah dengan tiba-tiba menghindarkan perlunya pihak pendakwaan untuk membuktikan bahawa perayu sesungguhnya telah melakukan salahlaku seks dan liwat; (iii) bahawa keputusan hakim perbicaraan untuk menghapuskan kesemua keterangan berhubung perlakuan salahlaku seks dan liwat adalah bersifat timbangtara dan memudaratkan perayu kerana beliau akan terhalang daripada menunjukkan bahawa beliau tidak melakukan perbuatan-perbuatan yang sedemikian; (iv) bahawa pendakwaan telah gagal membuktikan perlakuan sebarang 'corrupt practice' oleh perayu dalam 'capacity' beliau sebagai seorang 'member of the administration' 'whereby he has used his public position or office for his pecuniary or other advantage'; (v) bahawa keboleh-percayaan saksi utama pihak pendakwaan adalah meragukan; (vi) bahawa ungkapan 'pecuniary or other advantage' di dalam s. 2(2) Ordinan tersebut hanya boleh membawa maksud manfaat kewangan atau suatu manfaat yang mempunyai nilai kewangan; (vii) penggunaan tidak adil s. 136(1) Akte Keterangan 1950 oleh hakim perbicaraan untuk mengecualikan keterangan yang dipohon supaya dikemukakan oleh perayu sebagai tidak relevan dan tidak boleh diterima masuk; (viii) gangguan dan campurtangan yang keterlaluan oleh hakim perbicaraan; (ix) bahawa, berdasarkan keputusan baru-baru ini oleh Mahkamah Persekutuan di dalam *Zainur Zakaria v. PP* [2001] 3 CLJ 673, hakim perbicaraan sesungguhnya berat sebelah terhadap pembelaan dan/atau memihak kepada pendakwaan sepertimana yang dapat dilihat dari sifat ugutan dan konfrontasi beliau terhadap peguam-peguam pembelaan, khususnya perlakuan beliau dalam prosiding penghinaan yang dimulakan oleh beliau terhadap peguam pembelaan, Zainur Zakaria; (x) bahawa hukuman yang dijatuhkan adalah amat jelas keterlaluan berbanding dengan kes-kes yang telah diputuskan, dan bahawa ianya sepatutnya berkuatkuasa dari tarikh perayu ditahan reman.

Diputuskan:
Oleh Haidar Mohd Noor HMP

[1] Ordinan tersebut adalah dibatalkan dan tidak berkuatkuasa jika dan apabila kedua-dua Dewan Parliamen meluluskan satu resolusi setiap satu untuk membatalkannya selaras dengan per. 150(3) Perlembagaan persekutuan. Oleh itu, meskipun Dewan Rakyat telah pun meluluskan satu resolusi untuk membatalkan Ordinan tersebut, ianya terus berkuatkuasa kecuali dan sehingga Dewan Negara telah meluluskan satu resolusi yang sama untuk membatalkannya. Ordinan tersebut oleh itu terus mempunyai kuasa sepenuhnya, dan ianya adalah terpulang sepenuhnya kepada budibicara dan keutamaan Peguam Negara di bawah per. 145(3) Perlembagaan Persekutuan untuk mendakwa perayu di bawah Ordinan tersebut.

[2] Hakim perbicaraan adalah betul dalam meminda empat pertuduhan asal atas alasan penduaan. Lagi pun, beliau telah hanya melakukan sedemikian selepas mendengar peguam bagi kedua-dua pihak. Tambahan pula, hujahan pembukaan bagi pihak pendakwaan juga mendedahkan bahawa ianya tidak pernah berniat untuk membuktian 'commission of sexual misconduct and sodomy' tetapi hanya 'corrupt practice'. Oleh itu tidak terdapat salah laksana keadilan yang substansial yang telah disebabkan oleh pindaan-pindaan tersebut meskipun perangkaan awal pertuduhan tersebut oleh pihak pendakwaan adalah tidak tepat.

[3] Meskipun hakim perbicaraan tidak membenarkan pihak pembelaan untuk berhujah kepada mahkamah sebelum beliau membuat keputusan untuk menghapuskan kesemua keterangan berhubung dengan perlakuan salahlaku seks dan liwat, namun keputusan beliau tidak menyebabkan kegagalan melakukan keadilan. Ini adalah kerana kesan memudaratkan dari keterangan yang sedemikian (yang dijangkakan ke atas pihak pembelaan) jauh melebihi nilai probatifnya.

[4] Ungkapan 'corrupt practice' sepertimana yang diguanakan di dalam s. 2(1) Ordinan tersebut dan ditakrifkan di dalam s. 2(2) Ordinan tersebut tidak memerlukan supaya perbuatan salah yang dilakukan semestinya berkaitan dengan pelaksanaan tugas-tugas pegawai yang berkenaan. Ianya hanya merujuk kepada sebarang perbuatan yang dilakukan oleh mana-mana ahli atau pegawai dalam kedudukan beliau sebagai seorang ahli atau pegawai di mana beliau telah menggunakan kedudukan awam atau pejabat untuk manfaat kewangan beliau sendiri atau manfaat lain. Perkataan 'capacity' di s. 2(2) ordinan tersebut oleh itu tidak boleh dianggap sebagai bermakna 'duty'.

[5] Tidak terdapat sebarang alasan untuk menganggui taksiran hakim perbicraaan dan keputusannya berhubung dengan keboleh-percayaan saksi utama pihak pendakwaan. Kecuali ianya dapat ditunjukkan bahawa keputusan faktual hakim perbicaraan berhubung dengannya tidak disokong oleh atau adalah bertentangan dengan beratnya keterangan atau bahawa ianya adalah bertentangan, Mahkamah Persekutuan seharusnya lambat dalam menggangu keterangan-keterangan itu khususnya apabila Mahkamah Rayuan telah bersetuju dengannya.

[6] Matlamat Ordinan tersebut adalah luas hinggakan boleh mendakwa ahli-ahli politik dan pegawai-pegawai awam yang telah menyalahgunakan kedudukan atau jawatan awam mereka untuk manfaat kewangan atau manfaat lain bagi diri mereka sendiri. Penggunaan perkataan-perkataan 'pecuniary or other advantage' adalah jelas. Perkataan 'other' yang terdapat pada konteks pentakrifan tidak terjerat oleh kaedah *ejusdem generis*. Oleh itu perkataan-perkataan 'other advantage' di dalam s. 2(2) ordinan tersebut akan bermaksud 'other than pecuniary advantage'. Dalam kes ini, manfaat yang diperolehi oleh perayu adalah bahawa beliau telah 'saved himself from embarrassment' dan 'protected himself from any criminal action'.

[7] Hakim perbicaraan mempunyai tugas berkanun untuk memastikan bahawa perkara-perkara yang tidak relevan dan tidak boleh diterima masuk dikecualikan. Tugas beliau serta kuasa-kuasanya di bawah s. 136(1) Akta Keterangan 1950 adalah jelas.

[8] Meskipun terdapatnya gangguan yang kerap oleh hakim perbicaraan, namun beliau telah tidak 'descend into the arena and have his vision clouded by the dust of conflict'.

[9] Perlakuan hakim perbicraan dalam prosiding penghinaan terhadap Zainur Zakaria sesungguhnya tidak relevan kepada keempat-empat pertuduhan yang dihadapi oleh perayu. Meskipun hakim perbicaraan mungkin nampaknya telah memihak kepada pendakaan (sepertimana Mahkamah Persekutuan telah dapati di dalam *Zainur Zakaria v. PP* [2001] 3 CLJ 673), namun ianya tidak dapat diperkatakan bahawa beliau telah menunjukkan sikap yang sama – atas keterangan tersebut – dalam kes terhadap perayu. Bahawa hakim perbicaraan telah 'flexed every inch of his judicial muscle' atau mengeluarkan kata-kata yang kesat terhadap peguam-peguam pembelaan atau mengugut mereka dengan penghinaan, ia semestinya dipertimbangkan terhadap

latarbelakang perbicaraan tersebut yang sungguh menarik dan diterima dalam semangat itu. Perlakuan menyeluruh hakim perbicaraan tidak menyebabkan salah laksana perbicaraan yang mewajarkan gangguan.

Oleh Mohamed Dzaiddin KHN

[10] Hukuman yang dikenakan oleh hakim perbicaraan iaitu, enam tahun pemenjaraan bermula serentak daripada tarikh pensabitan, adalah tidak keterlaluan. Hakim perbicraaan telah melaksanakan budibicaranya di dalam lingkungan s. 282(d) Kanun Prosedur Jenayah, dan alaasan beliau kerana tidak membelakangkan hukuman kepada tarikh tahanan reman perayu adalah sah. Melainkan dalam keadaan yang terkecuali, sesebuah mahkamah rayuan tidak selalunya mengubah hukuman yang dikenakan oleh mahkamah perbicaraan.

[Rayuan ditolak, pensabitan dan hukuman diikrarkan.]

Case(s) referred to:

Barry Victor Randall v. The Queen (Privy Council, Appeal No 22 of 2001) ***(dist)***
Bhandulananda Jayatilake v. PP [1982] 1 MLJ 83 ***(foll)***
Dato' Seri Anwar Ibrahim v. PP [2000] 2 CLJ 695 ***(refd)***
Grace Shipping Inc & Anor v. CF Sharp & Co (Malaya) Pte Ltd [1987] 1 MLJ 257 ***(dist)***
Hj Abdul Ghani Ishak & Anor v. PP [1981] 2 MLJ 243 ***(refd)***
Hoi-Chin-Ming v. R [1991] 3 All ER 897 ***(refd)***
Ismail Hasnul; Abdul Ghafar v. Hasnul [1968] 1 MLJ 108 ***(refd)***
Juraimi Husin v. PP [1998] 2 CLJ 383 ***(refd)***
Karpal Singh & Anor v. PP [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183 ***(refd)***
Lok Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 ***(refd)***
Mohamad Kassan Hassan v. PP [1950] MLJ 295 ***(refd)***
Nunis v. PP [1982] 2 MLJ 114 ***(refd)***
PP v. Dato' Hj Mohamed Muslim Hj Othman [1983] MLJ 245 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 ***(refd)***
PP v. Datuk Cheng Swee & Ors [1979] 1 MLJ 166 ***(refd)***
PP v. Loo Choon Fatt [1976] 2 MLJ 257 ***(refd)***
Ratten v. R [1974] 131 CLJ 510 ***(refd)***
Teng Boon How v. PP [1993] 4 CLJ 545 ***(dist)***
Wong Kok Keong v. R [1955] MLJ 13 ***(refd)***
Zainur Zakaria v. PP [2001] 3 CLJ 673 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 92(1)
Criminal Procedure Code, ss. 158, 165, 282(d)
Dangerous Drugs Act 1952, s. 39B(1)(a)
Emergency (Essential Powers) Ordinance No 22, 1970, ss. 2(1), (2)
Evidence Act 1950, ss. 136(1), 167
Evidence Ordinance 1950, s. 167
Federal Constitution, arts. 145(3), 150(3), (8)(b)(iii), (iv), 160(2)
Penal Code, ss. 194, 377B

Other source(s) referred to:
Woodroffe & Ameer Ali, *The Law of Evidence*, 16th edn, vol 4, p 3805

For the appellant - Raja Aziz Addruse (Hj Sulaiman Abdullah, Christopher Fernando, Pawancheek Merican, Zulkifli Noordin, Sankara Narayanan Nair, Gurcharan Singh, Kamar Ainiah & Merisa Regina); M/s SN Nair & Partners
For the respondent - Abdul Gani Patail (Azahar Mohamed, Mohd Yusof Zainal Abidin SFC, Tun Abdul Majid Tun Hamzah, Nordin Hassan & Shamsul Sulaiman)

[Appeal from Court of Appeal, Criminal Appeal Nos: W-05-26-99 & W-05-27-99; High Court, Kuala Lumpur, Criminal Trial Nos: 45-48-98 & 45-49-98]

Reported by Gan Peng Chiang

JUDGMENT

Haidar Mohd Noor FCJ:

The appellant, after he was dismissed as the Deputy Prime Minister and Minister of Finance, was subsequently charged before the High Court on 5 October 1998 with five counts of sodomy under s. 377B of the Penal Code and five counts of corrupt practice under s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 ("the Ordinance"). He claimed trial to all ten charges. The prosecution elected to proceed with four charges under s. 2(1) of the Ordinance and applied to the High Court for the four charges to be tried together pursuant to s. 165 of the Criminal Procedure Code (FMS Cap. 6) ("CPC"). The defence did not object and it was accordingly allowed.

The appellant was found guilty on all the four charges, as amended at the close of the prosecution case, by the High Court. The appellant was convicted and sentenced to six years' imprisonment on each of the amended charges, the sentences to run concurrently. The learned judge, however, ordered the sentences to take effect from the date of conviction instead of from date of arrest of the appellant.

On appeal to the Court of Appeal, the appellant's appeal against the conviction and sentence was dismissed by the Court of Appeal (see [2000] 2 CLJ 695). Hence his appeal against the judgment of the Court of Appeal affirming his conviction and sentence to this court.

After hearing counsel for both parties we reserved our judgment as we intimated that we needed time to consider the many issues raised by the appellant's counsel. We now proceed to give our judgment.

All references to pages in this judgment with respect to the judgments of the High Court and the Court of Appeal are references to pages in [1999] 2 CLJ 215 and [2000] 2 CLJ 695 respectively.

In attempting to overturn the judgment of the Court of Appeal, the appellant in his petition of appeal filed on 5 June 2000 in this court set out thirty three (33) grounds and put them broadly under the following heads:

(a) abuse of process.

(b) amendment of charges.

(c) expunging of evidence.

(d) amended charges.

(e) judge's findings that offences committed.

(f) evidence and witnesses.

(g) evaluation of evidence.

(h) burden of proof.

(i) contempt of court.

(j) sentence.

We need not consider the grounds on a head to head basis as the grounds under certain heads seem to overlap and can conveniently be dealt with together.

We do not propose also to set out the facts of the case in detail save as and when necessary we will refer to the facts that may be relevant to the issues under consideration.

Abuse Of Process

We will consider the issue of abuse of process first because if the appellant succeeds on this ground, he will obviously succeed in his appeal before us. This is on the premise that the Dewan Rakyat by way of motion introduced by the Deputy Minister in the Prime Minister's Department, Y.B. Datuk Haji Mohamed Nazri bin Abdul Aziz on 22 October 1988 passed a resolution to annul the Ordinance in view of the coming into force of the Anti-Corruption Act 1997 on 8 January 1998 consolidating three pieces of legislation relating to corruption which had been in force earlier on, namely:

(i) Prevention of Corruption Act 1961;

(ii) Anti-Corruption Agency Act 1982; and

(iii) Emergency (Essential Powers) Ordinance No. 22 of 1970.

In matters of (iii) it can only cease to have effect if resolutions are passed by both Houses of Parliament annulling the Ordinance pursuant to art. 150(3) of the Federal Constitution ("Constitution"), which reads:

> (3) A Proclamation of Emergency and any ordinance promulgated under Clause (2B) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2B).

It is not disputed that the Dewan Negara (Upper House) has yet to pass a resolution to annul the Ordinance in accordance with art. 150(3) of the Constitution so that the Ordinance shall cease to have effect. It is also not disputed that the Government in moving the motion by way of a resolution in the Dewan Rakyat indicated its intention to annul the Ordinance in line with art. 150(3) of the Constitution. Y.M. Raja Aziz Addruse, leading counsel for the appellant submitted that he is not challenging the validity of the Ordinance as seemed to be the approach in the Court of Appeal. He submitted that it would only be a matter of course for a second resolution to be laid before and passed by the Dewan Negara. He said that it would be invidious and oppressive to subject the appellant to prosecution under a law that has ceased to have effect. This is what the Court of Appeal said at p. 706 of [2000] 2 CLJ 695:

> He asked this court to stop this abuse. In effect, he was asking this court to set the appellant free from all the four charges for which he has been convicted and sentenced.

We would in answer say that until a resolution is passed by the Dewan Negara pursuant to art. 150(3) of the Constitution, the Ordinance shall continue in force. While Raja Aziz submitted that he is not questioning the validity of the Ordinance, and rightly so, in view of sub-cl. (b)(iii) of cl. (8) of art. 150, he is, in the next breath, questioning the continuation in force of the Ordinance by his submission that as a matter of course or to put it in another way, as a matter of time, the resolution will be passed by the Dewan Negara. In other words, he is in effect questioning the validity of the continuation in force of the Ordinance. With respect, this would clearly be offending the clear constitutional provision by way of cl. (8) of art. 150 in particular sub-cl. (b)(iv) which reads:

(b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of:

(i) ...

(ii) …

(iii) …

(iv) the continuation in force of any such ordinance.

To that extent we agree with the Court of Appeal when it said at p. 708:

> Now that no resolution has been laid and passed by the Dewan Negara, Ordinance 22 must be taken to continue to have the full force of law.

It is not, in our respectful view, for this court to speculate whether a resolution would be passed in the Dewan Negara as a matter of course as Raja Aziz seemed to be urging us to do so. In view of our decision that the Ordinance continues in force the question of oppression or vexatiousness on the part of the attorney-general by mounting a prosecution against the appellant for offences under the Ordinance does not arise. This is a matter entirely within the discretion of the attorney-general under art. 145(3) of the Constitution to prefer any charges for offences under any law he deems fit depending on the facts of the case and taking into account the public interest element into consideration (*Karpal Singh & Anor v. PP* [1991] 2 CLJ 1458; [1991] 1 CLJ (Rep) 183). In view of our finding that the Ordinance remains or continues in force there is therefore no need for us to consider the issue of the meaning of the words "by virtue thereof" submitted by Raja Aziz. In the circumstances we cannot accept as correct the submission of Raja Aziz that it would be invidious and oppressive to subject the appellant to prosecution under a law that has ceased to have effect when it continues to have the full force of law.

While we agree that the court should not be impotent when it comes to abuse of its process and should intervene, if need be, we say that it depends on the circumstances of a particular case. The learned counsel cited the case of *Hoi-Chin-Ming v. R* [1991] 3 All ER 897 (PC) to support his submission on the abuse of process. We agree with the doctrine of abuse of process as did the Court of Appeal but we have to reiterate here that the application of the doctrine will depend on the facts of a particular case and the laws applicable. Here we are dealing with the law that was promulgated under special provisions of Part XI of the Constitution, which is, art. 150 (the proclamation of emergency). It should be noted that there is the overriding provision in cl. (8)(b) of art. 150 itself that

"notwithstanding anything in this Constitution" the court shall have no jurisdiction to entertain or determine any application in whatever form, on any ground, regarding the validity of, *inter alia*, the continuation in force of the Ordinance. It may be argued such a constitutional provision would amount to "closing the doors of the court" and is therefore harsh and unjust. Our answer is that this issue should be addressed to the legislature and not the courts by those who disagree with such a provision and they have their remedy at the ballot box (*Lok Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 at p. 188).

Therefore the question of abuse of process in this case is, with respect, quite misplaced.

The Charges

We will consider issues (b) to (i) under this heading as they can conveniently be dealt with together and are inter-related in some way or another.

As a preliminary issue, Raja Aziz submitted that while he conceded that the court has the discretionary power to amend the charges under s. 158 of the CPC, he questioned whether the learned judge has correctly exercised his discretion in this case. He said it is because the prosecution failed to prove beyond reasonable doubt that the appellant committed sexual misconduct and sodomy that prompted the prosecution to amend the charges at the close of the prosecution case and thereby the appellant was prejudiced by the amendments. In exercising his discretion to allow the amendment of the original charges at the close of the prosecution case, this is what the learned judge said at p. 233:

> It must be observed that the original charges relate to abuse of power under s. 2(1) of Ordinance No. 22. The references in the charges to sexual misconduct and sodomy 'committed' by the accused relate to another offence. This does not accord with s. 163 of the Criminal Procedure Code which provides that for every distinct offence of which any person is accused there shall be a separate charge. In order to avoid duplicity in the charges, I allowed the application to amend them.

The learned judge reproduced the four amended charges as well as the original four charges in his judgment. Having examined them, we are of the view that the learned judge had correctly exercised his discretion on the ground of duplicity in the charges.

The appellant claimed trial to the amended charges and did not wish to recall any of the prosecution witnesses. After listening to the submissions of both parties and before calling upon the appellant to enter his defence,

the learned judge made a formal amendment to the English version of the second and fourth charges and the addition of words to the first and third charges to specify that written statements were obtained as directed. The appellant was given the opportunity to plead to the two latter charges to which he claimed trial.

Looking at the original four charges one cannot help but have the impression that the prosecution will have to prove that the appellant committed sexual misconduct and sodomy. It is on this premise that the defence attempted to show by cross-examination of relevant witnesses that the appellant did not commit sexual misconduct and sodomy. This is more so with the production of the relevant exh. (P14A, B and C) showing the allegations in detail. They were reproduced in full in the judgment of the learned judge. In our view, the contents naturally triggered the defence to rebut that the appellant did commit sexual misconduct and sodomy. However, in the opening address of the prosecution, it seems clear that the prosecution did not at all state that it intended to prove that sexual misconduct and sodomy were committed by the appellant. This is borne out by what is stated in the opening address of the prosecution, exh. P13 in Appeal Record, vol. 3.

In view of Raja Aziz's complaint about the prejudicial effect of the amendment, it is best that we reproduce P13 in full so as to clear any doubts whatsoever:

Pendakwa Raya

Lawan

Dato' Seri Anwar bin Ibrahim

Pernyataan Pembukaan

Pendakwa Raya telah mengemukakan 4 pertuduhan terhadap tertuduh, Dato' Seri Anwar bin Ibrahim, kerana melakukan kesalahan-kesalahan di bawah seksyen 2(1), Ordinan No. 22 (Kuasa-kuasa Perlu) Dharurat, 1970. Semasa melakukan kesalahan-kesalahan tersebut tertuduh menjawat jawatan Timbalan Perdana Menteri dan Menteri Kewangan Malaysia.

Perkara yang membawa kepada kesalahan-kesalahan yang dilakukan oleh tertuduh berpunca daripada surat bertarikh 5 Ogos 1997 daripada Ummi Hafilda bt Ali kepada YAB Perdana Menteri berkaitan Perihal Salahlaku Timbalan Perdana Menteri (tertuduh) dan Pengakuan Bersumpah Azizan bin Abu Bakar, dan satu surat bertajuk "Talqin Terbuka Untuk Anwar Ibrahim".

Seterusnya apabila surat daripada Ummi Hafilda bt Ali dan Pengakuan Bersumpah Azizan bin Abu Bakar serta surat Talqin tersebut diketahui oleh tertuduh, dia telah mengambil berbagai tindakan bagi menafikan kandungan surat-surat dan Pengakuan Bersumpah berkenaan. Segala tindakan tertuduh itu telah diambil dengan menggunakan Cawangan Khas Polis Di Raja Malaysia. Tertuduh, sebagai Timbalan Perdana Menteri dan Menteri Kewangan, telah mengarahkan Pengarah Cawangan Khas, Dato' Mohd. Said bin Awang dan Timbalan Pengarah Cawangan Khas II, Dato' Amir bin Junus berjumpa dengannya di kediaman rasminya dan di dalam perjumpaan-perjumpaan tersebut tertuduh, antara lain, telah memberi arahan-arahan tertentu berkaitan surat-surat dan Pengakuan Bersumpah berkenaan. Hasil daripada arahan tertuduh, pihak Cawangan Khas telah memperolehi surat-surat penafian daripada Ummi Hafilda bt Ali dan Azizan bin Abu Bakar masing-masing bertarikh 18 Ogos 1997 dan 29 Ogos 1997 telah diperolehi. Surat-surat ini telah kononnya menjelaskan dan menafikan kandungan surat pertama dari Ummi Hafilda bt Ali bertarikh 5 Ogos 1997 serta Pengakuan Bersumpah Azizan.

Saksi-saksi dan dokumen-dokumen yang akan dikemukakan oleh Pendakwa Raya akan membuktikan melampaui sebarang keraguan yang munasabah bahawa tertuduh telah menggunakan kedudukannya sebagai Timbalan Perdana Menteri dan Menteri Kewangan untuk kepentingannya sendiri.

Timbalan Kanan Pendakwa Raya
Jabatan Peguam Negara
Malaysia

The prosecution should to a certain extent be faulted for framing the original charges not in accordance with what it intended to prove as stated in its opening address. We are of the view that besides the ground of duplicity in the charges as found by the learned judge, the contents of P13 as stated by us earlier, fortified our view that the learned judge has exercised his discretion correctly in amending the charges. The learned judge only ordered the amendment of the charges after hearing counsel for both parties and there is therefore no substantial miscarriage of justice caused to the defence. In the circumstances, there are no grounds for this court to interfere with the exercise of his judicial discretion.

Resulting from the exercise of his discretion in allowing the amendment of the charges, the learned judge took upon himself to expunge the evidence relating to the commission of sexual misconduct and sodomy. He did so in order that such evidence would not have prejudicial effect on the defence. Raja Aziz submitted that the learned judge did not hear the parties before expunging the evidence relating to sexual misconduct and sodomy committed by the appellant to the detriment of the defence. This is because the defence would show that the prosecution could not succeed

in proving the sexual misconduct and sodomy allegedly committed by the appellant. It was further contended by Raja Aziz that the defence was left in the dark as to what evidence that was really expunged since the learned judge failed to state clearly in his judgment which led to the detriment of the defence.

The primary issue here is whether the failure of the learned judge to allow the defence to address the court before his decision to expunge and the evidence that was expunged has occasioned an injustice to the defence.

After considering the entire record of proceedings our answer is that it has not caused an injustice to the appellant as the prejudicial effect far outweighed its probative value. We say so because if the evidence relating to the sexual misconduct and sodomy allegedly committed by the appellant is allowed to remain it will have prejudicial effect on the defence because what the prosecution need prove on the amended charges is only allegations of sexual misconduct and sodomy and not their commission. The learned judge, in our view, in allowing the amendment rightly held that the offence of sodomy is a distinct offence and in fact it is on record that charges of sodomy were preferred against the appellant and they were stood down.

We agree with counsel's submission that the learned judge failed to enumerate what evidence was expunged. However, the inference could only be that the evidence as to the truth or falsity of the allegations of sexual misconduct and sodomy is no longer the issue. Hence, any evidence touching on the truth or otherwise of the sexual misconduct and commission of sodomy by the appellant should not be allowed. The ruling of the learned judge on expunction can be gathered from what is stated by him at p. 239:

> I find it necessary and desirable to say a few words to guide the conduct of the case hereafter in view of fact that counsel on both sides had touched upon the truth of the allegations in the four amended charges. It is to be noted that the amended charges merely refer to allegations of sodomy and sexual misconduct and not to the actual commission of sodomy or sexual misconduct by the accused. The truth or falsity of the allegations are therefore not in issue in this trial. Any evidence or argument that has to or is to be directed upon that matter is therefore irrelevant and inadmissible. Accordingly, the evidence that is proposed to be elicited to meet the *prima facie* case established by the prosecution must be confined only to the issues raised in the amended charges.

It appears therefore that the parties were sufficiently put to notice by the learned judge of what was expected of the prosecution and the defence in the trial. We do not see how it can be said by the defence that they were in the dark regarding what evidence was expunged by the learned trial judge.

The appellant questioned the power of the learned judge to expunge the prejudicial evidence. We agree with the Court of Appeal that the learned judge has the inherent power to do so in order to prevent the prejudicial effect on the defence case. Such order is necessary for the purpose of securing the ends of justice. If no order is made it would then be a good ground of appeal where the conviction would in all probability be quashed by the appellate court. The case of *Mohamad Kassan bin Hassan v. PP* [1950] MLJ 295 cited on behalf of the appellant provides a good guide. There the High Court quashed the conviction of the accused by the Sessions Court on the ground that the improper admission of the evidence had caused a failure of justice. It happened in this way. The Sessions Court held that the charges were bad for duplicity and the charges were amended. But the inadmissible evidence to prove the amended charges still remained in the record of the proceedings.

For the above reasons, we do not agree with the submissions on behalf of the appellant on the amendment of the charges, the expunction of the evidence and the power to do so by the learned judge.

Raja Aziz further submitted that in spite of the amendment to the charges, there was still no case for the appellant to answer.

We now need to consider whether the prosecution against the appellant had proved the ingredients under s. 2(1) of the Ordinance before the High Court. According to the learned judge, in order to prove the charges against the appellant, the prosecution has to establish two ingredients, that is to say, that he is a Member of the administration at the material time and that while being such Member he committed a corrupt practice.

Under s. 2(2) of the Ordinance "corrupt practice" means any act done by any Member or officer referred to in sub-s. (1) in his capacity as such Member or officer, whereby he has used his public position or office for his pecuniary or other advantage; ...

The ingredient to be proved by the prosecution that is common to all the charges is that the appellant is a Member of the administration within the meaning assigned to it in art. 160(2) of the Constitution. The appellant did not dispute this ingredient. However, Raja Aziz submitted that the

prosecution has not proved the ingredient within the meaning of 'corrupt practice', that is, "whereby the appellant has used his public position or office for his pecuniary or other advantage".

This ingredient involves proof of two elements by the prosecution. They are:

(i) the manner in which the appellant used his public position; and

(ii) the advantage that he obtained.

The learned judge proceeded to consider the two elements separately from pp. 320 to 366. In our view, he has considered in detail in respect of the law relating to the meaning of the phrase "corrupt practice" by reference to *PP v. Dato Haji Mohamed Muslim bin Haji Othman* [1983] MLJ 245 and cases in respect of other jurisdictions as well. He concluded at pp. 329-330 thuswise:

> I must point out that there is no qualification in the definition of the expression 'corrupt practice' in s. 2(2) of Ordinance No 22 as in the Indian and Queensland legislation that I have referred to. It does not require that the act must be in relation to the discharge of duties of the officer concerned. It merely refers to any act done by any Member or officer in his capacity as such Member or officer whereby he has used his public position or office for his pecuniary or other advantage. That the act done must have been done in the capacity of the Member as such Member is similar to the language employed in s. 4(2) of the Prevention of Bribery Ordinance 1974 of Hong Kong. The judgment of the Privy Council in *Attorney General of Hong Kong v. Ip Chiu & Anor* [1980] 2 WLR 332 is therefore a good guide in interpreting the relevant part of the expression 'corrupt practice' in s. 2(2) of Ordinance No. 22. Thus the word 'capacity' in the definition must not be equated with 'duty'. The true test would therefore be whether the act done would have been done or could have been effectively done if the person in question were not the kind of Member that in fact he was. If the answer to the question is in the negative, then the act of the Member is one that was done in his capacity as such Member whereby he has used his public office for his advantage, provided that it could not equally easily have been done by any person not holding that office. It applies to any advantage obtained by the Member or officer concerned by the use of his influence.

We agree with the learned judge on the definition of 'corrupt practice' in s. 2(2) of the Ordinance and its application to the facts of this case. The directions must be in the context of the public position ie, as the Deputy Prime Minister and the Minister of Finance and not in his personal capacity. The learned judge went on to consider the evidence and this is what he said the prosecution must prove (p. 330):

> The prosecution must prove that the accused directed Dato' Mohd Said and Dato Amir Junus to obtain from Ummi and Azizan the written statement dated 18 August 1997 addressed to YAB Prime Minister with regard to the first and third charges to deny the allegations. The evidence relating to the manner in which the accused used his position in relation to the first and the third charges and in relation to the second and fourth charges are inter-related. As this ingredient forms a continuous series of acts in respect of both sets of charges, I shall deal with them together. In proof of this ingredient the prosecution must establish that:
>
> (1) Azizan made an allegation of sodomy as contained in his 'Pengakuan Besumpah' dated 5 August 1997 against the accused and Ummi made an allegation of sexual misconduct and sodomy as contained in her confidential report entitled 'Perihal Salah Laku Timbalan Perdana Menteri' dated 5 August 1997 against the accused; and
>
> (2) the accused directed Dato' Mohd Said and Dato' Amir Junus to obtain from Ummi and Azizan written statements addressed to YAB Prime Minister and public statements denying the allegations and that they obtained the statements as directed.

In respect of (1), after an evaluation of the evidence, the learned judge ruled there is evidence to show that Ummi and Azizan had made the allegations. In fact, in our view, the defence did not seriously dispute that the allegations were made but contended that they were false and fabricated. However, in view of the amendment to the charges, the truth or falsity of the allegations was no longer in issue. There are no reasons for us to disagree with the learned judge when he said at p. 333 that:

> there is evidence to show that Ummi and Azizan had made the allegations against the accused.

In respect of (2), the learned judge after extensively discussing the evidence of the relevant witnesses especially PW1 and PW11 in respect of directions given by the appellant, concluded at p. 356:

> Thus there is evidence that the accused directed Dato Mohd Said and Dato Amir Junus to obtain from Ummi and Azizan written statements addressed to YAB Prime Minister during the period 12 August 1997 to 17 August 1997 in respect of the first and third charges and public statements on or about 27 August 1997 in respect of the second and fourth charges denying his allegations that they had made against him and that the statements were obtained as directed.

We agree with Raja Aziz's submission that a lot depends on PW1's evidence especially in the face of his report, exh. D25 produced by the defence. It turns on his credibility. PW11's credibility was also attacked.

The first question that we have to satisfy ourselves is whether the learned judge has erred in considering the issue of credibility of witnesses in this case. Before considering the credibility of witnesses, that is Dato' Mohd Said, Dato' Amir Junus, ACP Mazlan, DSP Aziz, SAC Musa, Azizan and Ummi, all of whom were attacked by the defence, he sets out the tests to be followed at p. 293:

> The Privy Council has stated that the real tests for either accepting or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits in with the rest of the evidence and the circumstances of the case (see *Bhojraj v. Sitaram* AIR [1936] PC 60). It must, however, be observed that being unshaken in cross-examination is not *per se* an all-sufficient acid test of credibility. The inherent probability of a fact in issue must be the prime consideration (see *Muniandy & Ors v. PP* [1966] 1 MLJ 257). It has been held that if a witness demonstrably tells lies, his evidence must be looked upon with suspicion and treated with caution, but to say that it should be entirely rejected would be to go too far (see *Khoon Chye Hin v. PP* [1961] MLJ 105). It has also been held that discrepancies and contradictions there will always be in a case. In considering them, what the court has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence worthless and untrustworthy (see *De Silva v. PP* [1964] MLJ 81). The Indian Supreme Court has pointed out that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments (see *Ugar v. State of Bihar* AIR [1965] SC 277). It is useful to refer to *PP v. Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 where Raja Azlan Shah FJ (as His Highness then was) said at p. 19:
>
> > ... In my opinion, the discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other.
>
> In the absence of any contradiction, however, and in the absence of any element of inherent improbability, the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted (see *PP v. Mohamed Ali* [1962] MLJ 257).

Armed with the tests set out above, he then proceeded to consider the credibility of the relevant witnesses. He considered the evidence given by them in considerable detail with his reasons for his finding quite apart from his own observation of their demeanour. It is an established principle that an appellate court should be slow to disturb the finding of facts of the lower court especially here where there are concurrent findings of facts by two courts namely the High Court and the Court of Appeal. Unless it can be shown that the finding of facts are not supported by the evidence or it is against the weight of evidence or that it is a perverse finding it is not for us to disagree.

Further, we should be slow to disturb the learned judge's assessment and finding on the demeanour of the witnesses. This is for the simple reason that he is the best person to observe their demeanour. We are handicapped as we have to go by the cold print of their evidence in the notes of proceedings.

We have examined his finding in relation to the evidence before him and his reasons for the finding. We do not find any flaw so as to warrant our interference when he concluded that PW1 and PW11 are credible witnesses at pp. 296 and 301 respectively.

However, there is the complaint of Raja Aziz that the learned judge did not consider exh. D25, produced by the defence *vis-a-vis* PW1's credibility. There is the further complaint by Raja Aziz on the explanation by PW1 in relation to his use of the word 'sukarela' (meaning in English 'voluntary') in exh. D25. This is relevant in considering the credibility of PW1. He cited *Grace Shipping Inc. & Anor v CF Sharp & Co. (Malaya) Pte. Ltd.* [1987] 1 MLJ 257 to show that PW1's evidence on this aspect must be tested against the objective facts which were in the form of documents.

It is true that the learned judge did not make a specific finding in respect of exh. D25 *vis-a-vis* the credibility of PW1. However, at p. 265, he did touch on the evidence of PW1 in respect of exh. D25:

> Dato Mohd Said said that YAB Prime Minister had not asked for the report. He said that when exhibit D25 was prepared by him, his investigation had not been completed yet and no investigation had been conducted by the Special Branch to ascertain the truth of the allegations as contained in exhibit P14 A, B and C. He prepared exhibit D25 for the purpose of sending exhibits P17 and P18 to YAB Prime Minister. He said that he suggested in exhibit D25 that the investigation be stopped in view of exhibits P17 and P18. **The information from the other sources referred to in exhibit D25 was not verified.** Exhibits P17 and P18 formed the primary basis of exhibit D25. **The investigation was then stopped by the Special Branch suddenly.** (emphasis added)

We are of the view that exh. D25 should not be considered in isolation for the purpose of attacking the credibility of PW1 just because in exh. D25 he used the word 'sukarela' in it. We have to bear in mind how exhs. P17 and P18 were obtained. In fact there is evidence of the reluctance of Ummi and Azizan to retract their allegations that resulted in the 'turning over' process. Quite clearly, it was after taking into account the other relevant evidence that the learned judge ruled that PW1 is a credible witness. This is what he said at p. 296:

> His version of the sequence of the events is consistent with itself and **fits in with the rest of the evidence adduced.** (emphasis added)

In addition, PW1's explanation for the use of 'sukarela' therein must be taken in the context of the object of the appellant directing PW1 to get the retractions from PW12 and PW17.

Grace Shipping Inc. & Anor as relied by Raja Aziz was considered by the Court of Appeal (see pp. 719-720). After taking note of the observations of Lord Goff of Chieveley, the Court of Appeal was of the view that the documents in this case cannot be placed on the same footing as those commercial documents in the *Grace Shipping* case. The Court of Appeal went on to state that some of the documents in this case were obtained from a 'turning-over' process and hence cannot serve as 'objective facts' and therefore the observations in the *Grace Shipping* case cannot be applied to this case as suggested by Raja Aziz. The Court of Appeal went on to give its reason why exh. D25 as suggested by Raja Aziz could not be such a document serving as 'objective facts'. We agree.

We would add that exh. D25 is merely a report and the oral explanation of the word 'sukarela' therein has no legal significance as it is not a commercial document. For that matter it is for the learned judge to consider whether to accept the explanation or not. We are of the view there is sufficient evidence before him to support the explanation of PW1 on the use of the word 'sukarela'. If he has stated otherwise, as we said earlier, it would have been unlikely for YAB Prime Minister to say in his press statement that the allegations were baseless.

We are of the view that the learned judge did not commit errors here.

He has also considered the law and the facts on accomplices, when he ruled that PW1 and PW11 are accomplices. This is what he said at p. 292:

> I shall now consider whether their evidence, subject to a finding on their credibility, requires corroboration. This depends on the degree of their complicity in the offences committed by the accused. Dato' Mohd Said said that he had to follow the instructions given by the accused as he was the

> Deputy Prime Minister and not any ordinary person. He felt compelled to carry out the instructions and could not have refused them. Thus he had no choice in the matter. Dato' Amir Junus was in a similar position, In addition, he was also subjected to instructions from Dato' Mohd Said, his superior officer, to carry out what the accused wanted. ACP Mazlan and DSP Aziz were subordinate police officers who carried out the orders of their superiors. They said that they felt compelled to carry out the instructions. It is therefore clear that all the police officers were not willing participants in the offences but victims of them. They acted under a form of pressure which would have required some firmness to resist. In fact, they had no choice but to comply with the orders. In the circumstances, reliance can be placed on their uncorroborated evidence subject of, course to, it being found to be credible.

We agree that for the reasons stated by him the evidence of PW1 and PW11 need not be corroborated on the ground that he found them to be credible.

We now proceed to consider the interpretation of 'other advantage' in s. 2(2), as contemplated in the four charges, that is, 'for the purpose of saving himself from embarrassment' and 'for the purpose of protecting himself against any criminal action.' Firstly, Raja Aziz contended that the words 'other advantage' must be read *ejusdem generis*, that is, the form of advantage must be capable of having some monetary value. Our task is made easier in dealing with this issue as the meaning of 'other' appearing in the definition of 'corrupt practice' had been considered by the then Federal Court in *Haji Abdul Ghani bin Ishak & Anor v. Public Prosecutor* [1981] 2 MLJ 243 where Raja Azlan Shah, CJ (as His Highness then was) stated at pp. 246-247:

> It is therefore no longer in dispute that the object of Ordinance is wide so as to bring to book corrupt politicians and public officers **who abuse their public positions or office for their** pecuniary or **other advantage**. The use in the Ordinance of the words "pecuniary or other advantage" is significant. The word "other' appearing in the context of the definition is not caught by the e*jusdem generis* rule. (emphasis added)

As the words 'other advantage' need not be read *ejusdem generis*, it follows 'that other advantage need not necessarily be pecuniary in nature' (per Abdul Hamid, FJ (as he then was) in *Nunis v. PP* [1982] 2 MLJ 114 at p. 117 following *Public Prosecutor v. Datuk Cheng Swee & Ors* [1979] 1 MLJ 166 and *Haji Abdul Ghani bin Ishak, supra*). In fact in the case of *Nunis*, the application for leave to refer the construction of the words 'other advantage' in the context of 'corrupt practice' under the Ordinance was dismissed by the then Federal Court. We see no grounds to reconsider the construction of the words 'other advantage' in the context of the facts of the present case.

What we have to consider next is whether the phrases 'to save yourself from embarrassment' and 'for the purpose of protecting yourself from any criminal action' in the context of the facts related to the first and third charges and the second and fourth charges respectively come within the wide meaning of 'other advantage', that is, non-pecuniary.

After discussing the evidence in detail relating to the issue on embarrassment (at pp. 359-362) this is what the learned judge said at p. 362:

> The advancement of the submission on the basis of a distinction between the truth and the falsity of the allegations is faulty as that is not in issue in the case. Be that as it may, I agree with the argument that it is proper for a person to have defamatory matter against him retracted in order to avoid the embarrassment of going to court so as to save himself from the attendant adverse publicity. But this is subject to an important injunction. Such a person must not take the law into his own hands to resolve the problem as, for example, by beating up the person concerned to retract the defamatory matter. He could approach the person himself in a recognised manner to resolve the problem or appoint an advocate and solicitor to do so. I would also agree that if a person lodges a police report on the matter and requests the police to investigate thoroughly, he does no wrong. The evidence shows that the accused went beyond the permissible limits of the law. The charges in this case relate to a Deputy Prime Minister and Minister of Finance using the police against certain individuals in a purely personal matter. The directions that he gave to Dato Mohd Said and Dato Amir Junus to have the allegations retracted show that he had abused his position. The manner in which he wanted the allegations to be retracted is not a lawful way of doing so. I am therefore of the view that the argument cannot be sustained.

On the issue of 'for the purpose of protecting yourself from prosecution' this has been dealt with at length by the learned judge at pp. 362-366. Suffice for us to quote a part of it at pp. 365 to 366:

> It must be observed that the investigation concerned serious allegations against the accused. Despite the denial of the allegations by the accused in his police statement to SAC Musa on 19 August 1997, the investigation did not come to an end as SAC Musa wanted to record further statements. It was SAC Musa's intention to record these statements that prompted the accused to make use of the denial letters to stop the investigations from proceeding any further. He succeeded in doing so. I say this because the denial letters that the accused gave to SAC Musa caused the investigation to end abruptly. This is made evident by the fact that the letters influenced SAC Musa to recommend that no further action be taken in the case even though the investigation was not complete. It is superfluous to state that an investigation into the allegations clearly involves the accused directly

as the allegations were against him. As the investigation was brought to an abrupt end, there will be no further inquiry into the allegations. The premature termination of the investigation is an advantage to the accused as it thereby prevents the relevant authorities from making a decision on a possible prosecution. The accused has therefore saved himself from any criminal action by using exhs. P20 and P22 which had been unlawfully obtained. This brings into sharp focus the contention of the defence that the accused could not have been prosecuted if the allegations are not true with the result that he would have obtained no benefit when the investigation was stopped. The submission requires a consideration of whether the accused would have obtained an advantage if no criminal action is ultimately taken against him by virtue of the allegations being found to be false at the proper conclusion of the investigation. To my mind, this does not alter the advantage obtained by the accused in any way. It must be reiterated that the advantage obtained is only one of the elements involved in the charges. Thus, it must not be read in isolation. It must be read together with the manner in which the public statements were obtained. Viewed in that light, it will be seen that the investigation came to an end as a result of the use of the denial letters obtained unlawfully on the direction of the accused. The investigation was therefore stopped by unlawful means. One cannot adopt an illegal course of action to obtain a benefit in the belief that he is entitled to it. He has to allow law and order to take its normal course. Be that as it may, the argument advanced had in fact been considered in *PP v. Dato Haji Mohamed bin Haji Othman* [1983] 1 MLJ 245 where the accused was charged for having been present at a meeting in respect of a matter in which he had an interest. It was argued that his presence at the meeting would have made no difference to the approval of his application. In reply to this, Hashim Yeop A Sani J (as he then was) said at pp. 248-249:

> A number of witnesses both prosecution and defence said that they took no objection to the presence of the accused. In my view, the fact that no one took objection to the presence of the accused at the meeting does not alter the position in law. Nor the fact that according to some witnesses his presence would have made no difference whatsoever and that the application would have been approved anyway.

I was therefore unable to agree with the argument advanced by the defence.

We have carefully examined the evidence and the grounds of the learned judge and we see no reason to disagree with his decision at p. 366:

> Thus there is evidence to show that the accused had obtained an advantage in respect of the four charges as contemplated by them.

We say that the evidence is clear that the advantage obtained by the appellant is in respect of the use of his public position as Deputy Prime Minister and Minister of Finance and not in his personal capacity. We could not also possibly see how the allegations are aimed at the appellant as a private person other than his public position as Deputy Prime Minister and Minister of Finance and more so as Deputy Prime Minister as he would in all probabilities be the next Prime Minister. If the allegations were not retracted soonest possible, they would in our view, by the nature of the allegations, have serious damaging effect on his reputation and more importantly whether he would be a fit and proper person to hold the office of Deputy Prime Minister and eventually his chances of becoming the next Prime Minister.

From the notes of proceedings, after defence was called on the amended charges, the appellant called a total of 22 witnesses. He himself gave evidence on oath for over a period of seven days.

We will proceed to examine whether the learned judge applied the correct approach and had erred in law in coming to his conclusion that the defence has failed to raise any reasonable doubt as to the truth of the prosecution case or as to the appellant's guilt on the amended charges.

At the outset, we agree with the submission of Encik Christopher Fernando, that as a matter of principle if the defence can show that there was substantial injustice caused to the appellant, the appellant is entitled to be freed of the charges. In this regard, we would like to reiterate here that the thrust of the appellant's case before us is a complete lack of fairness on the part of the trial judge towards the defence.

We observe that the learned judge had considered the defence in detail citing excerpts of the relevant and material evidence of the witnesses in his judgment. See pp. 366-465.

In fairness to the appellant, although in his defence he denied giving directions as claimed by PW1 and PW11 and the evidence of his active participation in getting the retractions from Ummi and Azizan, he did however give his reasons for the denial. It is then a matter for the learned judge to consider his reasons by applying the settled principle of law placed on an accused person in a criminal trial that it is not for the accused, like the appellant in this case, to prove his innocence but for the prosecution to prove his guilt beyond reasonable doubt and that the onus on the defence is merely to cast a reasonable doubt on the prosecution case.

After considering at length the evidence the learned judge proceeded to explain why he rejected the following categories of evidence (pp. 386-410):

(1) Evidence relating to political conspiracy;

(2) Evidence relating to credit;

(3) Evidence relating to the taped conversation;

(4) Hearsay evidence;

(5) Evidence relating to other instances of alleged fabrication;

(6) Evidence relating to legal professional privilege.

We do not propose to go into detail in respect of the above categories considered by the learned judge. We will consider later as part of the criticism submitted by the learned counsel before us. Quite apart from the considerations of the categories set out above, he did consider anxiously some of the arguments raised in the submission that there was no case for the appellant to answer (see pp. 410-423). Again, we do not propose to set out all the arguments and reasoning as they will amount to a repetition.

Having examined the above arguments and given them our anxious consideration it is our finding that he came to the right conclusion in calling the appellant to answer on the amended charges when he stated at p. 455:

> It is therefore, my finding that the defence has not raised any reasonable doubt, on the whole of the evidence adduced, that the accused directed Dato Mohd. Said and Dato Amir Junus in his capacity as a Member of administration to obtain from Ummi and Azizan written statement addressed to YAB Prime Minister and public statements denying the allegations on the dates prescribed in the charges and that they obtained the statements as directed.

Next, the learned judge considered the evidence on the advantage obtained by the appellant and concluded at p. 464 as follows:

> It is therefore my finding that the defence has not raised any reasonable doubt on the whole of the evidence adduced, on the issue of the advantage obtained by the accused.

We do not with respect, agree with Tuan Haji Sulaiman's contention that the learned judge shifted the burden of proof to the defence by keep on changing 'the goal posts', perhaps to prevent the appellant from 'scoring goals'. The evidence adduced for the prosecution and for the defence, in our view, should not be considered in isolation but to be considered in totality. This is what the learned judge states in his verdict at p. 465:

> Having considered the whole of the evidence adduced, I am satisfied that in view of the numerous contradictions and inconsistencies in the defence evidence not only in that of the accused himself but also in that of his own witnesses, the defence is unworthy of any credence. Further, the defence has failed to raise any reasonable doubt as to the truth of the prosecution case or as the accused's guilt for the reasons that I have considered earlier. I therefore find that the prosecution has proved its case against the accused beyond reasonable doubt on all four charges and, in the upshot, I find him guilty as charged.

Considering the totality of the evidence, with respect, we cannot say that the learned judge erred in his appraisal of the evidence and in the upshot, he is correct to find the appellant guilty as charged.

Finally, we shall now consider the complaints mounted against the learned judge for his unfair conduct throughout the entire trial.

We would categorise the complaints broadly under the following heads:

(1) the invocation of his powers under the Evidence Act 1950;

(2) frequent interruptions by the learned judge; and

(3) threats of contempt and contempt against Zainur Zakaria, one of the counsel for the appellant, showed tendency towards the prosecution side.

(1) We must state at the outset that it is the statutory duty of a judge in conducting a trial to see that irrelevant evidence and inadmissible evidence are not allowed to be admitted. His powers in this respect are amply provided by the various provisions of the Evidence Act 1950 as well as the CPC.

We have examined the judgment of the learned judge on the invocation of his powers under the Evidence Act and the complaint that merits our consideration is in relation to the requirement for the defence to show the relevance of the witnesses to be called by the defence. The relevant section is s. 136(1) of the Evidence Act which reads:

> When either party proposes to give evidence of any fact, the court may ask the party **proposing** to give evidence in what manner the alleged fact, if proved, would be relevant and the court shall admit the evidence if it thinks that the fact, if proved, would be relevant, and not **otherwise.** (emphasis added)

The wordings above are wide for the learned judge to exercise his discretion. It even extends to the power to set aside a subpoena issued against a witness. Raja Azlan Shah, J, (as His Highness then was) speaking for the Federal Court, in *Ismail Hasnul; Abdul Ghafar v. Hasnul* [1968] 1 MLJ 108 said at pp. 110 to 111:

> The court possesses inherent jurisdiction to see that this privilege is properly exercised and in a proper case can restrain its abuse.

We have examined the record, we cannot say that the learned judge wrongly exercised his power or for that matter abused his power.

(2) We accept that from the record there were frequent interruptions by the learned judge. Counsel relied on *Teng Boon How v. PP* [1993] 4 CLJ 545, a drug trafficking case under s. 39B(1)(a) of the Dangerous Drugs Act 1952 where the Federal Court set aside the conviction on this ground alone.

We need to examine the various interruptions by the learned judge in this case as compared to the conduct of the learned judicial commissioner in *Teng Boon How*. We observe, without having to particularise them, that the learned judge in this case was concerned more about the issues of relevancy and admissibility. We have quoted his concern on these issues in the early part of this judgment when he made a ruling in respect of expunction of evidence.

In the course of the trial there would be occasions where he need to enforce his ruling. In this case, in view of the publicity generated in the trial, not only nationally but internationally, there is the more reason for the learned judge to be extremely cautious or perhaps he was being overzealous as things at times appeared to get a bit out of hand.

In respect of *Teng Boon How*, the cross-examination of the appellant by the learned judicial commissioner took place after he had been examined, cross-examined by the Deputy Public Prosecutor and re-examined by the defence counsel and more particularly it was upon recall by the trial judge after the appellant's re-examination was concluded (see p. 549). In other words, there were excessive interference or interruptions in the drug trafficking case by the learned judicial commissioner so much so that he fell into error in descending 'into the arena of disputes' and as a result allowed his judgment to be clouded.

We agree what the Court of Appeal in this case said at p. 735:

In the present appeal, after looking through the notes of proceedings page by page, we certainly did not find the trial judge falling into error in the same manner as found in *Teng Boon How*, not even anywhere close to it. We are therefore unable to accede to the learned counsel's submission with the result that there is no room to apply *Teng Boon How*.

(3) Raja Aziz submitted that there was lack of objectivity on the part of the learned judge. He referred to the conduct of the learned judge in dealing with the contempt proceeding against one of the counsel for the appellant, Zainur Zakaria, by referring to the Federal Court decision of *Zainur Zakaria v. PP* [2001] 3 CLJ 673 where at pp. 706-707 it confirmed the trial judge's attitude was confrontational towards the defence and more prosecution prone.

We are of the view that the facts and circumstances of *Zainur Zakaria* cannot be equated to the facts of this case. There it was more towards the conduct of Zainur Zakaria that the learned judge was more concerned with. From what we can gather from the record, it was the learned judge's belief that Zainur Zakaria's action was to delay the proceedings and to sensationalise the trial by alleging on the conduct of the two prosecutors to fabricate evidence against the appellant. The conduct of the learned judge in *Zainur*'s case is not really relevant to the amended charges faced by the appellant. In addition thereto, there was the allegation of lack of time given for Zainur Zakaria to prepare his defence. The learned judge might well appear to lean towards the prosecution as indicated by the Federal Court but it cannot be said to be showing the same inclination on the evidence, in the trial against the appellant. A good illustration is where as we stated earlier, he considered the appellant's case at length.

Encik Christopher Fernando submitted that there were threats of contempt against counsel including himself by the learned judge. We have examined Encik Christopher Fernando's complaint but regret to say that the learned judge, being human himself and as stated earlier because of the wide publicity given to this case, had to exercise a lot of restraints in controlling the proceedings and in doing so he may have uttered harsh words or even threatened counsel with contempt and all these must be taken in that spirit. It is not so much of the learned judge leaning towards the prosecution or being prejudiced towards the defence. He has the statutory duty to see that irrelevant and inadmissible evidence are not allowed to creep in or for that matter stop counsel from challenging his rulings as otherwise the proceedings will go haywire.

To round up and in support of the claim of unfair conduct of the learned judge in this case, we were furnished by the appellant's counsel with the latest judgment of the Privy Council in *Barry Victor Randall v. The Queen* (Privy Council Appeal No. 22 of 2001) delivered on 16 April 2001 by Lord Bingham of Cornhill.

This was an appeal against conviction and sentence passed by the Court of Appeal of the Cayman Islands. The primary ground of appeal against conviction was that the trial was conducted in a manner which was grossly and fundamentally unfair. The source of the unfairness was the conduct of the prosecuting counsel which was said to have undermined the integrity of the trial process. But complaint was also made that the trial judge wrongly failed to restrain the conduct of the prosecuting counsel and on occasion endorsed it.

The Board laid down some rules in order to safeguard the fairness of a trial under an adversarial system so as to ensure that the proceedings, however closely contested and however highly charged, are conducted in a manner which is orderly and fair. It went on to state some of these rules. For the purpose of the appeal before us, the following rule is instructive:

> (3) It is the responsibility of the judge to ensure that the proceedings are conducted in an orderly manner which is fair to both prosecution and defence. He must neither be nor appear to be partisan. If counsel begin to misbehave he must at once exert his authority to require observance of accepted standards of conduct.

The Board further reminded itself that in a criminal trial the observance of certain basic rules has been shown to be the most effective safeguard against unfairness, error and abuse.

Based on the facts and circumstances of the case, the Board came to the following conclusion (para. 29 of the report):

> 29. The crucial issue in the present appeal is whether there were such departures from good practice in the course of the appellant's trial as to deny him the substance of a fair trial. The Board reluctantly concludes that there were. Prosecuting counsel conducted himself as no minister of justice should conduct himself. The trial judge failed to exert the authority vested in him to control the proceedings and enforce proper standards of behaviour. Regrettably, he allowed himself to be overborne and allowed his antipathy to both the appellant and his counsel to be only too manifest. While none of the appellant's complaints taken on its own would support a successful appeal, taken together they leave the Board with no choice but to quash the appellant's convictions. It cannot be sure that the matters of which complaint is made, taken together, did not inhibit the presentation of the defence case and distract the attention of the jury from the crucial issues they had to decide.

In allowing the appeal, the Board held that it disagreed with the view taken by the Court of Appeal on the principal issue in the appeal as it did not give full consideration to a large number of the appellant's complaints.

In the case before us, as we stated earlier, the learned judge was clear in his mind when he told the parties to confine to relevancy and admissibility of the evidence to be presented. It is obvious to us that he has to exert his authority to see to the proper conduct of the trial. Hence, perhaps by the use of the phrase 'flex his judicial muscle' by him. We observe that there were occasions when the defence team challenged his ruling which they should not do as it amounts to challenging his authority. There is always avenue to challenge them on appeal which they did before us.

We are not persuaded that the conduct of the learned judge as alleged by the defence amounted to a miscarriage of justice for us to interfere. The facts in *Randall*'s case relied on by the defence are distinguishable from the facts of this case and therefore has no application to this case. We would however endorse the statement of principles with regard to what should be the standard of fairness and the responsibility of a trial judge to ensure that proceedings, are conducted in an orderly manner in a trial under an adversarial system such as ours.

Tuan Haji Sulaiman also complained that their submission on the conduct of the learned judge in the Court of Appeal was brushed aside by them. We have examined the judgment of the Court of Appeal and agree there was an omission on their part to consider this issue. Nonetheless, we have considered this point.

Finally, the paramount question here is whether the conduct of the trial judge which the appellant said was grossly unfair towards him has occasioned any miscarriage of justice which entitled him to an acquittal.

On this issue we are guided by s. 92(1) of the Courts of Judicature Act 1964 in particular the proviso to s. 92(1) which reads:

> (1) At the hearing of an appeal the Federal Court shall hear the appellant or his advocate, if he appears, and, if it thinks fit, the respondent or the advocate, if he appears, and may hear the appellant or his advocate in reply, and the Federal Court may thereupon confirm, reverse or vary the decision of the (Court of Appeal), or may order a retrial or may remit the matter with the opinion of the Federal Court thereon to the (High Court), or may make such other order in the matter as to it may seem just, and may by that order exercise any power which the (Court of Appeal or the High Court) might have exercised:

> Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

In addition to the above we have s. 167 of the Evidence Act 1950 that works in tandem with the proviso to s. 92(1) of the Courts of Judicature Act 1964. It reads:

> 167. The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

The two provisions set out above had recently been considered by the Court of Appeal in the famous case of *Juraimi bin Husin v. Public Prosecutor* [1998] 2 CLJ 383.

In *Juraimi*, the Court of Appeal respectfully adopted and applied what was said by Barwick CJ in the Australian case of *Ratten v. R* [1974] 131 CLR 510 on the approach it took to the proviso at p. 516 and also considered two authorities namely *Wong Kok Keong v. R* [1955] MLJ 13 and Woodroffe & Ameer Ali's *The Law of Evidence* (16th edn) vol. 4.

This is what Barwick CJ said at p. 516:

> Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the Court of Criminal Appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. *It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of like mind.* But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration. (emphasis added)

In *Wong Kok Keong*, Spencer Wilkinson, J, dealt with s. 167 of the Evidence Ordinance at p. 15 thus:

... in order to discover whether there has been a failure of justice one must be guided by s. 167. I know of no criterion as to what 'justice' or 'a failure of justice' is except what is laid down by the law. One cannot in my opinion be guided by any such theoretical conception as natural justice. I agree, with respect, with the remark made by Finnemore J in *Semtex Ltd v. Gladstone* [1954] 2 All ER 206 at p. 212:

> ... I hope the law of this country and natural justice will approximate always as closely as possible, but all claims and legal defences have to be grounded in law, and not according to somebody's idea of natural justice, not even that of the judge who may hear the case, ...

In my opinion, therefore the sole test as to whether or not the judgment of the court below should be reversed or altered on account of the wrongful admission of this certificate is whether or not without that evidence there was sufficient evidence to justify the conviction.

Woodroffe & Ameer Ali deals with s. 176 at p. 3805 thus:

> Section 167 applies to both criminal as well as civil proceedings, and it is but one of the many applications of that principle which is at the root of modern legislation respecting judicial procedure, namely, that if legal technicalities cannot be wholly excluded, they shall at least be prevented from materially impeding the course of judicial proceedings and the attainment of that substantial justice which should be their only aim.

The Court of Appeal thereafter concluded at p. 437 thus:

> To summarise the authorities cited, if in a criminal appeal an appellant has demonstrated errors in point of evidence or procedure, it is the duty of this court to determine whether, despite the error or errors in question, there exists a reasonable doubt in its mind as to the guilt of the accused, based upon the admissible evidence on the record. If the error or errors complained of do not have this effect, then it is our duty to plainly say so and maintain the conviction.

The judgment of the Court of Appeal was affirmed by the Federal Court though no written grounds were made.

We have examined the record of the proceedings and the grounds of judgment of the learned judge as closely as we can and the grounds of judgment of the Court of Appeal in subsequently affirming the conviction of the appellant by the learned judge. We are satisfied that the errors complained of have not occasioned a substantial miscarriage of justice and we have to plainly say so and to uphold the conviction.

The appeal against the conviction is accordingly dismissed.

My learned Chief Justice will deal with the appeal against the sentence.

Mohamed Dzaiddin CJ:

Appeal Against Sentence

On sentence, the trial judge passed a sentence of six years' imprisonment for each of the four charges to run concurrently from the date of conviction.

The learned judge based his decision on the following factors:

First, he considered the general principles of sentencing which the court should take into account, namely, the gravity of the offence; circumstances surrounding the commission of the offence; the antecedents of the appellant; any factor that warrants special attention in favour of or against the appellant and public interest.

Secondly, in assessing the appropriate sentence, he considered the object of Ordinance No. 22. Any sentence for s. 2(1) of the Ordinance must take into account the position occupied by the politician or public officer concerned and the nature of the abuse. He relied on *Nunis v. PP* [1982] 2 MLJ 114. Therefore, bearing in mind the position and status of the appellant and the manner in which he abused his position as the second most powerful officer of the executive, it was therefore appropriate for him to impose a custodial sentence.

Thirdly, with regard to the appropriate custodial sentence, the learned judge was of the view that as the maximum term of imprisonment under s. 2(1) is 14 years, the initial calculation of the sentence to be imposed would be in the range of nine years. However, from the initial figure calculated, allowance was made for the appellant's service to the nation for 16 years and his previous clean record. Against these factors, he held that the offences which the appellant committed were not technical or merely inadvertent but ones that were premeditated and executed over a period of time. He also found that the appellant did not display any sign of remorse throughout the trial.

Fourthly, he considered whether the sentence should take effect from the date of remand. In the exercise of his discretion, he declined to backdate the sentence of six years' imprisonment to commence from the date of arrest. His reasons are as follows:

> In the case of the accused it must be observed that he has been in remand in respect of 10 charges five of which relates to sodomy allegedly committed by him. Thus his remand is also in respect of offences other than the four charges for which I had found him guilty. In *R v. McHugh* [1985] 1 NSWLR 588 it was held that it is desirable to back-date a sentence

where a pre-trial custody exclusively refers to the offence for which sentence is being passed (see also *R v. Reed* [1992] 2 VR 484). As the accused's remand is also in respect of other offences the commencement of the sentence from his date of arrest will therefore be not appropriate. Thus I took into account the period spent by the accused in remand, even in the absence of any application having been made to that effect, by reducing the length of sentence that would otherwise have been imposed. In the circumstances I convicted the accused and passed a sentence of six years' imprisonment in respect of each of the four charges. I ordered that the sentences are to run concurrently notwithstanding the fact that there was no reply from the defence to the prosecution submission for the sentences to be consecutive. As I have taken account of the period the accused had spent in remand in assessing the sentence my order was that the sentence shall commence from the date of conviction.

In the Court of Appeal, Encik Christopher Fernando had submitted that the sentence handed down by the trial judge was excessive and referred to *PP v. Dato' Hj Mohamed Muslim bin Haji Othman* [1983] 1 MLJ 245 and *Hj Abdul Ghani bin Ishak & Anor v. PP* [1981] 2 MLJ 231 in support of his plea in mitigation. The Court of Appeal however summarily rejected counsel's submission and entirely agreed with the judgment of the trial judge on the sentence.

The crucial issue before us here is whether or not the imposition of six years' imprisonment for each of the four charges to run concurrently from the date of conviction is manifestly excessive.

The learned judge gave his reasons, which we have adverted to above, in imposing a custodial sentence of six years from the date of conviction. He also gave his reasons for not backdating the sentence from the date of arrest. Clearly, the learned judge was exercising his discretionary power under s. 282(d) of the Criminal Procedure Code. The section reads as follows:

With regard to sentences of imprisonment the following provisions shall be allowed:

(a) ...

(b) ...

(c) ...

(d) Every sentence of imprisonment shall take effect from the date on which the same was passed unless the Court passing such sentence otherwise directs.

It is of the upmost importance to stress here that the appellate court will not normally alter the sentence unless it is satisfied that the sentence passed by the lower court is manifestly inadequate or excessive or illegal or otherwise not a proper sentence having regard to all the facts disclosed or that the court has clearly erred in applying correct principles in the assessment of sentence. See: *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 257.

In *Bhandulananda Jayatilake v. Public Prosecutor* [1982] 1 MLJ 83, the appellant pleaded guilty to giving false evidence on a murder trial, an offence under s. 194 of the Penal Code which carried a maximum sentence of 20 years and a fine. The trial judge imposed a sentence of ten years imprisonment. His appeal against the sentence was dismissed by the Federal Court. Raja Azlan Shah Ag. LP (as His Royal Highness then was) stated (at p. 84):

> Is the sentence harsh and manifestly excessive? We would paraphrase it in this way. As this is an appeal against the exercise of the learned judge of a discretion vested in him, is the sentence so far outside the normal discretionary limits as to enable this court to say that its imposition must have involved an error of law of some description? I have had occasion to say elsewhere, that the very concept of judicial discretion involves a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred. That is quite inevitable. Human nature being what it is, different judges applying the same principles at the same time in the same country to similar facts may sometimes reach different conclusions (see *Jamieson v. Jamieson*). It is for that reason that some very conscientious judges have thought it their duty to visit particular crimes with exemplary sentences; whilst others equally conscientious have thought it their duty to view the same crimes with leniency. Therefore sentences do vary in apparently similar circumstances with the habit of mind of the particular judge. It is for that reason also that this court has said it again and again it will not normally interfere with sentences, and the possibility or even the probability, that another court would have imposed a different sentence is not sufficient, *per se*, to warrant this court's interference.

We are in full agreement with the statement of principle enunciated above.

After considering the reasons given by the learned judge, we are satisfied that the imposition of the sentence of six years' imprisonment to commence from the date of conviction has not occasioned an error of principle or law. Therefore, we see no reason to interfere with the exercise of discretion vested in him.

Accordingly, we dismiss the appeal against sentence.